MINUTES
Wednesday, July 13, 2005
8:30 a.m. – 10:30 a.m.
Missouri Department of Transportation, Creek Trail Drive

The July 13, 2005 meeting was called to order at 8:30 a.m. by Co-Chair Micki Knudsen.

Agenda Items

SAM II Update – Jan Heckemeyer, Office of Administration
Jan provided a brief update on the upcoming SAM II desktop upgrade. The most significant change that users will notice is the implementation of the inactivity timeout feature. Once this feature is implemented, the system will automatically disconnect the user if there has been no activity for one hour. The production date of the change is August 15. Other minor system changes will also occur on this date. A description of the changes is posted on the SAM II website under Scheduled Upgrades.

Overview of changes to Workers' Compensation Law – Nasreen Esmail, DOLIR*
Nasreen gave an overview of the changes to the Workers' Compensation laws, which will take effect on August 28, 2005. She encouraged everyone to read the actual legislation (the truly agreed to and finally passed version of Senate Bills Nos. 1 &130). The changes are significant for employers and employees. There will be many issues to be worked through as "test cases" are presented under the new law. In addition to the handouts below, Nasreen handed out a booklet, "How the Changes in the Workers' Compensation Law Affect You." If you would like a copy of this, please contact DOLIR, Division of Workers' Compensation. These handouts are also available electronically on DOLIR's website.

Overview of changes to Unemployment Insurance Laws regarding Drug Testing effective January 1, 2005 – Carol Luecke and David Strange – DOLIR*
Last year House Bill 1268 was passed, which went into effective January 1, 2005, specifically regarding unemployment compensation eligibility where a termination is due to a positive drug or alcohol test. Carol gave an overview of RSMo 285.045. The new law can be found by going to http://www.moga.mo.gov/statutes/c200-299/2880000045.htm. The handout presented provides very specific information regarding the documents and questions the division staff request in this type of case. The main difference between RSMo 228.050 and RSMo 228.045 is the latter has a more severe penalty and is specific to misconduct related to drug and alcohol testing. If anyone has any specific questions, please contact Carol at 751-3895 or David at 751-4012.

Annual Leave Sweep – Micki Knudsen, MoDOT*
Micki handed out a chart of comments from other agencies regarding changing the Annual Leave Sweep date from October 31 to December 31. She asked that the agencies let her know if she misrepresented their comments. If any agency hasn't sent in their comments and would like to, please do so by Monday, July 18, 2005. Micki will be discussing this item with MoDOT's Senior Management Team. She will report at the August SHRMC meeting the results of that meeting.

OA Update – Gary Fogelbach, Office of Administration
There is a four-hour personnel training class on how to conduct interviews on September 28. This class is about developing skills to more effectively use the interview process to determine the "best" candidate. It is not about how to use the on-line application system, EAS*e*. Please let Gary know if you want a flyer. On July 12, the Departments' Directors were invited to OA Personnel to attend an overview on the laws, regulations, and processes of the Missouri Merit System. There is another Merit System 101 class scheduled for July 14 at 1:00 p.m. for HR Directors. It may prove valuable to hear what was presented to the Department Directors. Gary announced that Carleen Dickneite is retiring at the end of August. There will be a reception for her on August 26. Gary will verify the time at the next SHRMC meeting.

Other Announcements

Lori Hague asked how other departments are handling the EAS*e* system. One response was they had to change the availability to get transcripts. Gary thought that Les Balty was working on something.

Next SHRMC Meeting: August 10, 2005, 8:30 a.m.
Location: MoDOT, 1320 Creek Trail Drive, Conference Room I-70

Meeting adjourned.

***THE HANDOUTS FOR THESE TOPICS ARE BELOW.**

WORKERS' COMPENSATION OVERVIEW OF NEW LAW

PRESENTED BY

PATRICIA "PAT" SECREST

DIRECTOR

DIVISION OF WORKERS' COMPENSATION

WORKERS COMPENSATION OVERVIEW OF NEW LAW

- CHANGES PURSUANT TO SENATE BILLS 1 & 130 SIGNED BY GOV. BLUNT MARCH 30, 2005
- MOST CHANGES WILL BE EFFECTIVE ON AUGUST 28, 2005
- CHANGES REGARDING ADMINISTRATIVE LAW JUDGES AND LEGAL ADVISORS EFFECTIVE JANUARY 1, 2006

WORKERS COMPENSATION OVERVIEW OF NEW LAW

- Disclaimer: Each Workers' Compensation case is fact specific. The interpretation of the law and changes thereto will be determined by the Administrative Law Judges, Labor & Industrial Relations Commission or the Appellate Courts of the State based upon the issues and the evidence presented.

STRICT CONSTRUCTION

The Labor & Industrial Relations Commission and the Division of Workers' Compensation, Administrative Law Judges, Associate Administrative Law Judges and reviewing courts will be required to interpret the workers' compensation law strictly.

Section 287.800.1

STRICT CONSTRUCTION

The Commission, Division and the reviewing courts will strictly interpret the words to further the purpose and object of the statutory changes to the workers' compensation law as written by the legislature.

Section 287.800.1

STRICT CONSTRUCTION

The Administrative Law Judges and the Labor & Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of doubt to any party when resolving the factual conflicts.

Section 287.800.2

ABROGATION OF CASE LAW

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate (abolish) certain earlier case law interpretations. This was done by the legislature to emphasize the importance of new definitions and the strict interpretation of the law by the Labor and Industrial Relations Commission, Division of Workers' Compensation and the Administrative Law Judges.

Section 287.020.10

JURISDICTION

- **Chapter 287 RSMo applies to all cases within its provisions, except to those exclusively covered by any federal law and those addressed in §287.120.**

Section 287.110 (1)

JURISDICTION CONT.

- **Chapter 287 RSMo applies to:**
  - **All injuries received and occupational diseases contracted in Missouri;**
  - **All injuries received and occupational diseases contracted outside Missouri under contract of employment made in the State of Missouri, unless the contract of employment provides otherwise,**
  - **All injuries received and occupational diseases contracted outside of Missouri where the employee's employment was principally localized in Missouri within thirteen calendar weeks of the injury or diagnosis of the occupational disease.**

Section 287.110 (2)

BURDEN OF PROOF

- New §287.808 has been added.
  - The burden of establishing an affirmative defense is on the employer.
  - The employee or dependent has the burden of proving that he is entitled to compensation under the workers' compensation law.
  - In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

DEFINITION OF EMPLOYEE

- Does not include an individual who is:
  - The owner, as defined by §301.010 (43), and
  - Operator of a motor vehicle which is
  - Leased or contracted with a driver,
  - To a for-hire motor carrier operating within a commercial zone or operating under a certificate issued by the Missouri or United States Department of Transportation or by any of its sub-agencies.

Section 287.020 (1)

DEFINITION OF EMPLOYEE CONT.

- The old subsection 6 of §287.020 has been deleted. The old subsection stated that:
  - A person who is employed by the same employer for more than five and one-half consecutive work days shall for the purpose of this chapter be considered an "employee".

DEFINITION OF ACCIDENT
CHAPTER 287.020 RSMo

- Unexpected traumatic event or unusual strain identifiable by time and place of occurrence.
- Producing objective symptoms of injury caused by a specific event during a single work shift.
- Injury is not compensable if work was a triggering or precipitating factor.
- Injury should arise out of and in the course of employment.

Section 287.020.2

DEFINITION OF INJURY

PREVAILING FACTOR: Formerly for an injury to be compensable, employment had to be a substantial factor in causing the resulting medical condition or disability.

Now, to be compensable the accident must be:

"THE PREVAILING FACTOR IN CAUSING BOTH THE RESULTING MEDICAL CONDITION AND DISABILITY."

Section 287.020.3

PREVAILING FACTOR

Definition - The prevailing factor is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Section 287.020.3(1)

IDIOPATHIC INJURIES

Idiopathic Injuries are <u>not</u> compensable.

An idiopathic injury is one that is innate or is a peculiar weakness personal to the employee unrelated to employment.

The event results from some cause personal to the individual.

Section 287.020.3 (3)

HEART ATTACKS, ETC.

A cardiovascular(a disease of the heart or blood vessels), pulmonary (relating to, or affecting the lungs), respiratory (relating to, used in, or affecting respiration), or other disease, or cerebrovascular accident (stroke) or myocardial infarction (heart attack) suffered by an employee is not compensable unless . . . . .

The employee proves that the accident was the prevailing factor in causing the resulting medical condition.

Section 287.020.3(4)

GOING TO AND COMING FROM WORK

<u>General Rule:</u>

Injuries that an employee sustains going to and coming from the place of employment are not compensable.

Recent revisions impact upon company owned or subsidized cars and "extension of premises" doctrine [mall parking lot cases].

GOING TO AND COMING FROM WORK

Company Owned or Subsidized Autos

Injuries, in company owned or subsidized automobiles, that occur while traveling from the employee's home to the employer's principal place of business or vice versa are not compensable.

Section 287.020.5

PARKING LOT CASES

The "extension of premises" doctrine is abrogated (abolished) to the extent it extends liability for accidents that occur on property not owned or controlled by the employer. Even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from his place of employment.

Section 287.020.5

OCCUPATIONAL DISEASES

- **Last Exposure: The last exposure rule changes which employer is liable in an occupational disease case. Formerly, the employer who last exposed the employee to the hazard prior to the claim being filed was liable.**
- **Now the last employer who exposed the employee to the hazard, *prior to evidence of disability*, is liable, subject to the notice provision of §287.420.**

Section 287.063.2

OCCUPATIONAL DISEASES

- Statute of Limitations: Adds that the statute of limitations in occupational disease cases shall not begin to run until it becomes reasonably discoverable and apparent that an injury has been sustained "related to such exposure."

Section 287.063.3

OCCUPATIONAL DISEASES DEFINED

- Prevailing Factor: Occupational diseases and injuries due to repetitive motion "are compensable only if the occupational exposure was the prevailing factor" in causing both the resulting medical condition and the disability.

Section 287.067.2

  - Definition: "Prevailing Factor" is "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."

Section 287.067.2

OCCUPATIONAL DISEASES

- Repetitive Motion: Creates a new subsection 3 recognizing injuries due to repetitive motion as occupational diseases.

Section 287.067.3

- Aging: "Ordinary, gradual deterioration or progressive degeneration of the body caused by aging, or by the normal activities of day-to-day living shall not be compensable."

Section 287.067.3

OCCUPATIONAL DISEASES

- **Firefighters and Police Officers:**
  - Paid firefighters of a paid fire department or paid police officers of a paid police department certified under chapter 590, RSMo, need to establish a direct causal relationship in order to receive workers' compensation benefits for diseases of the lungs or respiratory tract, hypotension, hypertension, or diseases of the heart or cardiovascular system. These diseases are defined to be a disability due to exposure to smoke, gases, carcinogens and inadequate oxygen.
  - Under the current law, a firefighter of a paid fire department must establish a direct causal relationship in order to receive benefits for psychological stress. The new law does not change this requirement. The new law does not extend the direct causal relationship standard for psychological stress to the paid police officers of a paid police department.

Section 287.067.6

OCCUPATIONAL DISEASES

Three Month Rule:

The three month rule regarding repetitive motion injuries – is limited to going back to the "immediate prior employer" if work at that immediate prior employer was the prevailing factor in causing the injury. This specifically deletes the former "the substantial contributing factor" language.

Section 287.067.8

SAFETY CHANGES

1. If the employee fails to use safety devices provided by the employer or fails to obey safety rules, compensation is reduced between twenty-five (25) and fifty (50) percent. Current law requires reduction of 15%.
2. The employee's failure to use safety devices no longer has to be willful. In addition an employer is required to make a "reasonable" effort to cause employees to follow the safety rules.

Section 287.120.5

SAFETY CHANGES CONT.

- **Changes will place greater emphasis on safety and make employees and employers more conscious of the impact safety has on injury reduction.**

DRUG AND ALCOHOL CHANGES

The effect of the new statutory changes will be to reduce benefits in those circumstances where drugs or alcohol were the proximate cause of the injury. It allows employers to control the use of drugs and alcohol in the workplace that might lead to injuries.

Section 287.120.6(1)

DRUG AND ALCOHOL CHANGES CONT.

1. **When an injury is sustained in conjunction with the use of alcohol or non-prescribed controlled drugs the compensation "shall" be reduced by 50% instead of the former 15% reduction.**

Section 287.120.6 (1)

DRUG AND ALCOHOL CHANGES

Actual Knowledge/Diligent Effort Deleted:

2. **Deletes the former requirement that an employee had to have "actual knowledge" of the employer's no alcohol/drug-free workplace policy in order for the former 15% benefit reduction to apply.**
3. **Now, not only does the law <u>not</u> require actual knowledge of such policies, but the former requirement that employers had to make a "diligent effort to inform the employee of the requirement to obey any reasonable rule or policy" was deleted and not replaced with any new standard.**

Section 287.120.6(1)

DRUG AND ALCOHOL CHANGES

Proximate Cause-Forfeiture:

- **The law remains that if "the use of alcohol or non-prescribed controlled drugs in violation of the employer's rule or policy is the proximate cause of the injury" benefits shall be forfeited.**
- **The new law does not require an employer to post and publicize its rules or policy.**
- **In addition, the new law <u>deletes</u> the former provision that forfeiture did not apply if the employer had actual knowledge of the employee's alcohol/drug use which was not authorized by the employer.**

(Deleted Section 287.120.6(2)(a) and (b).)

DRUG AND ALCOHOL CHANGES

<u>Legal Intoxication</u>:

- **New 287.120.6(3) provides that if the employee's blood alcohol content is sufficient to constitute legal intoxication a rebuttable presumption is created that the employee's voluntary use of alcohol was the proximate cause of the injury. An employee can rebut the presumption by a preponderance of the evidence.**
- **Also, adds that an employee's refusal to take a drug or alcohol test at the employer's request results in benefit forfeiture if: (1) "the employer had sufficient cause to suspect" drug or alcohol use OR (2) the employer's policy clearly authorizes such post-injury testing.**

Section 287.120.6(3)

RECREATIONAL ACTIVITIES

- The former law specifically excluded from coverage only injuries resulting from ***voluntary*** participation in a recreational activity or program that resulted in the proximate cause of the injury.
- The new law deletes the words "voluntary" and "proximate" and excludes injuries where the recreational activity or program is the prevailing cause of the injury regardless of the fact that the employer may have promoted, sponsored or supported the recreational activity or program.

Section 287.120.7

RECREATIONAL ACTIVITIES CONTD.

The forfeiture of benefits or compensation shall not apply when:

a) The employee was directly ordered by the employer to participate in such recreational activity or program;

b) The employee was paid wages or travel expenses while participating in such recreational activity or program; or

RECREATIONAL ACTIVITIES CONT.

c) The injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity or program and of the unsafe condition of the premises and failed to either curtail the recreational activity or program or cure the unsafe condition.

FRAUD CHANGES

Deletes the previous subsection (2) and moves it under subsection 1.

- It shall be unlawful for any insurance company or self-insured employer in Missouri to knowingly and intentionally refuse to comply with known and legally indisputable compensation obligations with intent to defraud.

Section 287.18.2

Creates a new subsection 8:

- It shall be unlawful for any person to knowingly make or cause to be made a false or fraudulent material statement to an investigator of the Division who is investigating an allegation of fraud or noncompliance

Section 287.128.8

FRAUD CHANGES

- Section 287.128.4 makes a violation of the fraud provisions in §287.128 (1) or (2) a class D felony rather than a class A misdemeanor. The person shall be liable to the State of Missouri for a fine up to ten thousand dollars or double the value of the fraud whichever is greater.
- A violation of §287.128 (3) is a class A misdemeanor and a person is liable to the State of Missouri for a fine up to ten thousand dollars.
- A person who previously pled guilty or was found guilty of violating subsection 1, 2 or 3 and subsequently violates any provision of subsection 1,2, or 3 shall be guilty of a class C felony.

FRAUD CHANGES

Creates a new sub-section 5

- It is unlawful for any person, company or entity to prepare or provide an invalid certificate of workers' compensation insurance.
- Any person who violates this subsection shall be guilty of a class D felony and, in addition, is liable to the State of Missouri for a fine up to ten thousand dollars or double the value of the fraud, whichever is greater.

Section 287.128.5

FRAUD CHANGES

- Any employer who knowingly fails to insure its workers' compensation liability under the law shall be guilty of a class A misdemeanor.
- The employer is also liable to the State of Missouri for a penalty up to three times the annual premium the employer would have paid if he obtained coverage or up to fifty thousand dollars whichever is greater.

Section 287.128.7

FRAUD CHANGES

- All records, reports, tapes, photographs and documentation submitted to the Division's Fraud and Noncompliance Unit by any person, including the Department of Insurance, to conduct the investigation for violations under the workers' compensation law, are confidential and not subject to the Sunshine Law.
- However, the Fraud Unit's records can be released to the local, state or federal law enforcement authorities that are conducting an investigation upon written request.

Section 287.128.9

FRAUD CHANGES

All fraud prosecutions shall be commenced within three years after discovery of the offense by the aggrieved party or by a "person who has the legal duty to represent the aggrieved party" [i.e. the attorney general or the prosecuting attorney having jurisdiction to file charges] and who is not a party to the offense.

Section 287.128.11

ADMINISTRATIVE LAW JUDGES AND LEGAL ADVISORS

1) The Division Director may appoint additional Administrative Law Judges for a maximum number of forty.

   a) The Division currently has twenty-six (26) Administrative Law Judges and twenty-two (22) Legal Advisors. One of the changes is the elimination of the Legal Advisors position from the current statute.

   b) Fourteen (14) additional Administrative Law Judges may be appointed to bring the total number to 40 as authorized by the new law.

Section 287.610.1

ADMINISTRATIVE LAW JUDGES

The Division Director along with the members of the "Administrative Law Judge Review Committee" will develop written performance audit standards by October 1, 2005.

The Division Director along with the ALJ Review Committee will conduct a performance audit of all Administrative Law Judges every two (2) years.

Upon completing the performance audit for each Administrative Law Judge, the Committee will make a recommendation of confidence or no confidence.

Section 287.610.2

REPORTING OF INJURIES CHANGES TO POSTER

Employees who fail to notify their employer of an accident or injury within thirty (30) days "may jeopardize their ability to receive compensation, and any other benefits under this chapter".

Section 287.127.1(2)

REPORTING OF INJURIES

Employers/Insurers have 30 days - instead of 10 – after knowledge of an injury to file a First Report of Injury with the Division under the rules and in such form and detail as the Division may require.

However, the new law does not change the requirement for an employer to report all injuries to its insurance carrier or third-party administrator, within five days of the date of injury or within five days of the date the injury was reported to the employer by the employee, whichever is later.

Section 287.380.1

REPORTING OF INJURIES

Employers must report the injury to their workers' compensation insurance carrier. Self-insured employers must report the injuries to their Claims Administrator or TPA to enable them to file a First Report of Injury with the Division.

Injuries reported in a timely manner may result in a reduction of costs and provide better service to the injured employee.

Section 287.380.1

REPORTING OF INJURIES

The law remains that any employer or insurer who knowingly fails to report any accident to the Division

or knowingly makes a false report or statement in writing to the Division or Commission,

shall be deemed guilty of a misdemeanor and subject to a fine or imprisonment or both.

Section 287.380.4

EXPERIENCE RATING PLAN

- The rating plan shall prohibit an adjustment to the experience modification of an employer if:
  - The total medical cost does not exceed one thousand dollars, and
  - The employer pays all of the total medical costs, and
  - There is no lost time from employment other than the first three days or less of disability under §287.160 (1) and
  - No claim is filed

Section 287.957

EXPERIENCE RATING PLAN CONT.

Note: An employer opting to utilize this provision maintains an obligation to report the injury under subsection 1 of §287.380.

Section 287.957

LEAVE TO ATTEND TO MEDICAL CARE

The employer may allow or require an employee to use any of the employee's accumulated paid leave, personal leave, or medical or sick leave to attend to medical treatment, physical rehabilitation, or medical evaluations during work time.

The intent of this subsection is to specifically supercede and abrogate (abolish) any case law that contradicts the express language of this section.

Section 287.140.14

BONUS PAYMENTS

A monetary bonus, paid by an employer to an employee, of up to three percent (3%) of the employee's yearly compensation from such employer shall not have the effect of increasing the compensation amount used in calculating the employee's compensation or wages for purposes of any workers' compensation claim governed by this chapter.

Section 287.253

COST OF PROCEEDINGS TEMPORARY AWARDS

If the Division or the Commission determines that any proceedings have been brought, prosecuted, or defended without reasonable grounds, the division may assess the whole cost of the proceedings upon the party who brought, prosecuted, or defended them.

Previously, §287.203 stated that "Reasonable cost of recovery shall be awarded to the prevailing party."

The statutory changes do not make a distinction between the hardship hearing or an evidentiary hearing that is brought, prosecuted or defended without reasonable grounds.

In such cases, the Administrative Law Judge may assess the whole cost of the proceeding upon the party who brought, prosecuted or defended them.

Section 287.203

WRITTEN NOTICE OF THE ACCIDENT

To maintain a proceeding for compensation under Chapter 287;

- **Written notice of the time, place and nature of the injury; and**
- **The name and address of the injured person;**
- **Has to be given to the employer;**
- **No later than thirty days after the accident;**
- **Unless the employer was not prejudiced by failure to receive the notice.**

Section 287.420

WRITTEN NOTICE OF THE ACCIDENT CONT.

- The previous requirement of providing written notice of the time, place and nature of the injury and name and address of the person injured "as soon as practicable after the happening thereof" has been deleted.
- Also deleted is the finding of the Division or Commission on good cause for failure to give notice
- In addition, the old language of "no defect or inaccuracy in the notice shall invalidate it unless the commission finds that the employer was in fact misled and prejudiced thereby" has been deleted.

Section 287.420

WRITTEN NOTICE OF THE OCCUPATIONAL DISEASE OR REPETITIVE TRAUMA

To maintain a proceeding for compensation under Chapter 287 for any occupational disease or repetitive trauma:

- Written notice of the time, place, and nature of the injury; and
- The name and address of the person injured;
- Has to be given to the employer;
- No later than thirty days after the diagnosis of the condition;
- Unless the employee can prove the employer was not prejudiced by failure to receive notice.

Section 287.420

TEMPORARY TOTAL DISABILITY (TTD) BENEFITS

An employee is disqualified from receiving TTD during any period of time in which the claimant applies and receives unemployment compensation.

The dollar for dollar credit to the employer for unemployment compensation paid to the employee and charged to the employer for the adjudicated or agreed – upon period of TTD has been deleted.

Section 287.170.3

POST INJURY MISCONDUCT TERMINATION

If the employee is terminated from employment based upon post-injury misconduct neither TTD nor TPD benefits are payable

The phrase "post-injury misconduct" shall not include absence from the work place due to an injury unless the employee is capable of working with restrictions as certified by a physician.

Section 287.170.4

PERMANENT PARTIAL DISABILITY

I.

- **Permanent Partial Disability means a disability that is permanent in nature and partial in degree.**

Section 287.190.6 (1)

PERMANENT PARTIAL DISABILITY CONT.

II. Where payments are made as indicated below, the percentage of disability shall be conclusively presumed to continue undiminished, when:

- **(i)a settlement is approved by either the Administrative Law Judge or Commission,**
- **(ii) a rating established by medical finding, certified by a physician, and approved by an Administrative Law Judge, or**
- **(iii) an award by the Administrative Law Judge or Commission.**

Section 287.190.6 (1)

PERMANENT PARTIAL DISABILITY CONT.

III. Pre-existing Disability Credit:

Any award of compensation shall be reduced by an amount proportional to permanent partial disability that is determined to be:

- A pre-existing disease or condition, or
- Attributed to natural aging process that is sufficient to cause or prolong the disability or need for treatment.

Section 287.190.6 (3)

COMPROMISE SETTLEMENTS

- Parties may enter into voluntary agreements to settle or compromise any dispute or claim for compensation.
- For the agreement to be valid it must be approved by the Administrative Law Judge or Commission.
- Settlement must be in accordance with the rights of the parties.

Section 287.390.1

COMPROMISE SETTLEMENTS CONT.

- The Administrative Law Judge or Commission shall approve a settlement agreement as valid and enforceable.
  - As long as the settlement is not the result of undue influence or fraud,
  - The employee fully understands his or her rights to benefits, and
  - Voluntarily agrees to accept the terms of the agreement.

Section 287.390.1

COMPROMISE SETTLEMENTS

- Offer Made by Employer/Employee not represented by an attorney-
  - When an offer of settlement is made in writing and filed with the Division by the employer, an employee is entitled to 100% of the amount offered, provided that such employee is not represented by counsel at the time the offer is tendered.

Section 287.390.5

COMPROMISE SETTLEMENTS CONT.

- Offer not accepted by the employee/additional proceeding on claim
  - Where the employee does not accept the offer of settlement and additional proceedings take place with respect to the claim:
    - The employee is entitled to 100% of the amount initially offered.
    - Legal counsel representing the employee shall receive reasonable fees for services rendered.

Section 287.390.5

COMPROMISE SETTLEMENTS CONT.

- "Amount in dispute" is defined as "the dollar amount in excess of the dollar amount offered or paid by the employer."
- An offer of settlement shall not be construed as an admission of liability.

Section 287.390.6

SELF INSURED EMPLOYER FILING BANKRUPTCY LIQUIDATION OR DISSOLUTION

- Upon notice of a self-insured member filing for bankruptcy, liquidation or dissolution, the division shall notify in writing any employee of a self-insured member who has:
  - An open claim for compensation or First Report of Injury filed with the division,
  - At that employee's last known address
  - Of his/her obligation to file a proof of claim,
  - With the court of jurisdiction,
  - And provide to the Division and the Missouri Private Sector Individual Self Employers Guaranty Corporation (MPSISIGC) the records set out in §287.865.

Section 287.865 (5)

SELF INSURED EMPLOYER FILING BANKRUPTCY LIQUIDATION OR DISSOLUTION CONT.

- Any claimant who claims benefits under Chapter 287 RSMo against an insolvent self-insured member of MPSISIGC shall:
  - File with the bankruptcy court having jurisdiction over the bankruptcy of the self-insured employer.
  - A proof of claim or other claim forms required by the bankruptcy court.
- To secure a claim against the bankrupt employer,
- Before the Division acquires jurisdiction

Section 287.865 (5)

SELF INSURED EMPLOYER FILING BANKRUPTCY LIQUIDATION OR DISSOLUTION CONT.

- Claimant shall provide the MPSISIGC and the Division a copy, certified by the bankruptcy court, attesting to the filing of such claim or claim forms.
- Certification shall include:
  - The date of alleged loss alleged against the bankrupt employer,
  - Description of injuries claimed, and
  - The date the claim or claims were filed with the bankruptcy court

SELF INSURED EMPLOYER FILING BANKRUPTCY LIQUIDATION OR DISSOLUTION CONT.

- **If the claimant fails to provide the records, the Division is barred from exercising jurisdiction over any matter for which an employee may otherwise be entitled to benefits under Chapter 287, RSMo.**

Section 287.865 (5)

OTHER CHANGES

- **MILEAGE – Employee will receive mileage reimbursement for medical examination or treatment outside of local or metropolitan area from the employee's principal place of employment (not place of injury or place of residence under old law)**

Section 287.140.1

- **DELETES – The temporary partial disability benefits paid to employee for undergoing physical rehabilitation for "serious injury," or for evaluating permanent disability.**

Note: §287.141 still governs the physical rehabilitation benefits from the Second Injury Fund.

Section 287.140.1

OTHER CHANGES CONT.

- **VOCATIONAL EVALUATION**- Requires employees to submit to appropriate vocational testing and vocational rehabilitation assessment scheduled by an employer or its insurer.

Section 287.143

- **EMPLOYER'S SUBROGATION LIEN**- Adds language giving employers a subrogation lien on any third-party recovery.

Section 287.150

OTHER CHANGES CONT.

- **OCCUPATIONAL HEARING LOSS- Establishes the decibel standards on the most current ANSI occupational hearing loss standard. The Division shall promulgate a rule on the hearing loss standards.**

  Section 287.197

- **SURVEILANCE NOT A "STATEMENT"- Statement does not include a videotape, motion picture, or visual reproduction of an image of an employee. Also, 'statement' now may be provided within 30 days – instead of 15 days- of a proper written request by employee, dependent or their attorney.**

  Section 287.215

- **TEMPORARY AWARD PENALTY – Failure to comply with temporary award may result in the doubling of the amount "equal to the value of compensation ordered and unpaid" in the final award.**

  Section 287.510

OTHER CHANGES CONT.

- **RELIGIOUS EXEMPTION** – 287.804 – Religious Exception: An employee may file an application to be excepted from workers' compensation coverage if both the "employee and employer are members of a recognized religious sect or division, as defined in 26 U.S.C. 1402 (g)" and are conscientiously opposed to accepting public or private insurance benefits. Exception may be prospective only.

  Section 287.804

STATUTORY EMPLOYER OWNER/OPERATOR

- **Deletes: Subsection 2 of §287.040**
- **Adds: New subsection 4 to §287.040 which states:**

  (i) §287.040 shall not apply to the relationship between a for-hire motor carrier and an owner and operator of a motor vehicle.

  Section 287.040

OWNER/OPERATOR

- **Creates a new §287.043 that rejects and abrogates certain cases that interpreted or defined 'owner' in applying the provisions of §287.040 (4) [relationship between for-hire motor carrier and owner] and §287.020 (1) [definition of employee]**

OWNER/OPERATOR CONT.

- **Creates a new Section 287.041 which states that:**
  - (i) **Notwithstanding the provisions of §287.030 [employer defined] and §287.040 [statutory employers.]**
  - (ii) **For-hire motor carrier shall not be determined to be the employer of**
    - **a lessor defined by 49 C.F.R. §376.2 (f), or**
    - **a driver receiving remuneration from a lessor**

    The term "for-hire motor carrier' shall not include an organization described in §501 (c) (3) of the Internal Revenue Code or any governmental entity.

OTHER CHANGES CONT.

- **REVIEW OF CLAIMS – Beginning January 1, 2006, only Administrative Law Judges, the Commission, and the Appellate Courts have the power to review claims.**

  Section 287.801

WORKERS' COMPENSATION ADMINISTRATIVE TAX

- Changes Cash Flow of tax payment
- Requires payment of tax on current year tax rate instead of prior year's tax rate

Section 287.710

WORKERS' COMPENSATION ADMINISTRATIVE TAX

- Caps the annual surcharge rate at 3% of insurance premiums
- Prior law imposed no limit on the surcharge percentage
- Requires Division Director to calculate surcharge by October 31st for the following year
- If not calculated timely, any increase from prior year is not effective for the first calendar quarter of the following year

Section 287.715

- Labor & Industrial Relations Commission 573/751-2461
- Patricia "Pat" Secrest, Director 573/751-7646
- Richard Stickann, Mgmt. Analyst Sp. 573/526-2701
- Nasreen Esmail, Chief Legal Advisor 573/526-4941
- Dennis Moore, Chief Administrator, 573/526-6630
- Fraud & Noncompliance Unit 800/592-6003
- Employee Toll Free Number 800/775-2667
- Employer Toll Free Number 888/837-6069
- Yvonne Haslag, Injury Processing Unit 573/526-4948

■ Shari Cyrus, Benefits Unit Manager	573/522-1467
■ Richard Cole, Self-Insurance Manager	573/526-6004
■ Glenn Easley, Mediation Unit	573/526-4951
■ Leon Lawson, Workers' Safety Manager	573/526-3504
■ Cape Girardeau Adjudication Office	573/290-5757
■ Jefferson City Adjudication Office	573/751-4231
■ Joplin Adjudication Office	417/629-3032
■ Kansas City Adjudication Office	816/889-2481
■ St. Charles Adjudication Office	636/940-3326
■ St. Louis Adjudication Office	314/340-6865
■ St. Joseph Adjudication Office	816/387-227

Division of Workers' Compensation Website Address is:

www.dolir.mo.gov

2005 WL 1431512 (8th Cir.(Mo.))

Briefs and Other Related Documents

--- F.3d ---

Only the Westlaw citation is currently available.

United States Court of Appeals,
Eighth Circuit.
LOCAL 2379, UNITED AUTOMOBILE **AEROSPACE** AND **AGRICULTURAL** IMPLEMENT WORKERS OF AMERICA, Plaintiff--Appellee,
v.
ABB, INC., Defendant--Appellant.
No. 04-2914.
Submitted: April 14, 2005.
Filed: June 21, 2005.

Background: Union local brought state-court action against employer seeking declaration that Missouri Workers' Compensation Law (MWCL) was violated by provision of collective bargaining agreement requiring employees to use paid leave, rather than excused unpaid leave, to cover time away from work seeking follow-up medical care for work-related injuries. Employer removed action on basis of diversity. The United States District Court for the Western District of Missouri, Laughrey, J., entered judgment for union, and employer appealed.

Holding: The Court of Appeals, Gruender, Circuit Judge, held that MWCL provision mandating that employer provide for medical treatment of work-related injuries "in addition to all other compensation" did not prohibit employer from requiring injured employees to use paid leave for follow-up treatment.
Reversed and remanded in part.

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(E) Medical or Other Expenses
413IX(E)1 In General
413k965 Extent of Right
413k966 k. In General. Most Cited Cases

Provision of Missouri Workers' Compensation Law mandating that employer provide for medical treatment of work-related injuries "in addition to all other compensation" did not prohibit employer from requiring injured employees to use paid leave, rather than excused unpaid leave, to attend follow-up medical treatment scheduled during work hours; term "compensation," as used in statute, referred not to employees' overall compensation in course of employment relationship but rather to lost wages due to injuries, and could not confer sole discretion on employees whether to use paid or unpaid leave to receive follow-up treatment. V.A.M.S. §287.140 subd. 1.
Appeal from the United States District Court for the Western District of Missouri.
Counsel who presented argument on behalf of the appellant was Jerry M. Hunter of St. Louis, MO.
Timothy C. Mooney, Jr., of St. Louis also appeared on appellant's brief.
Counsel who presented argument on behalf of the appellee was Gerald Kretmar of St. Louis, MO.

Before MELLOY, COLLOTON, and GRUENDER, Circuit Judges.

GRUENDER, Circuit J.

*1 ABB, Inc. ("ABB") appeals from the district court's grant of summary judgment in favor of Local 2379 of the United Automobile, Aerospace and Agricultural Implement Workers of America ("the Local"). We hold that the Missouri Workers' Compensation Law ("MWCL") does not prohibit an employer from requiring an injured employee to use paid-leave benefits, rather than unpaid leave, to attend follow-up medical treatment scheduled during work hours. For the reasons discussed below, we reverse the judgment of the district court and remand for entry of summary judgment in favor of ABB.

I. BACKGROUND

The Local is the exclusive bargaining agent for the hourly production and maintenance workers employed at ABB's Jefferson City, Missouri plant. Accordingly, a collective bargaining agreement ("CBA") governs the terms and conditions of employment for the plant's hourly workforce. For this appeal, the pertinent portion of the CBA is Article IX, Section 3, which provides in relevant part:

[ABB] and [the Local] agree that all laws of the State of Missouri shall govern regarding the administration of industrial injury as required. [ABB], [the Local], and the employees will be subject to the laws set forth and any State legislation that is modified, changed, amended and enacted will be applied as required by laws in effect or as they become effective.

App. 83-84.

Before entering into the CBA, ABB maintained a practice of paying its employees their full salary for time away from work to receive follow-up medical treatment related to a workplace injury. Employees were not required to use paid-leave benefits, defined in the CBA as paid vacation or personal business leave, and would not be charged with an absenteeism occurrence. Believing its practice went beyond the requirements of Missouri law, ABB unilaterally chose to adopt a policy requiring injured employees to use paid-leave benefits to cover the time away from work seeking follow-up medical care. The Local immediately filed grievances on behalf of a number of employees, protesting the required use of paid-leave benefits and the imposition of unexcused occurrences [FN1] for failure to do so. To resolve the grievances, ABB and the Local eventually entered into a supplemental agreement to the CBA, which included an "unexcused occurrences" provision and an "exception" provision:

[ABB] will no longer charge represented employees with an unexcused occurrence for absences due to disabilities, whether work-related (workers' compensation) or nonwork-related (A & S or short term disability). Nor will any previously recorded occurrences for disabilities be used in any future attendance-related discipline steps.

...

An exception to this Agreement is that any represented employee who refuses to use either vacation and/or personal business (PB) days for post injury/illness doctors' and therapy visits during work hours will be charged an unexcused occurrence for the time away from work.

*2 Agreement Between ABB-Jefferson City and UAW Local 2379 ("Supplemental Agreement"). [FN2] Despite the negotiated agreement, the Local filed suit against ABB in Missouri state court. The complaint sought a declaratory judgment that the exception provision is contrary to Missouri law because it impermissibly encumbers an injured employee's statutory right to medical treatment. On May 21, 2003, the case was properly removed to the United States District Court for the Western District of Missouri. At the time of removal, the parties were of diverse citizenship and the amount in controversy was greater than $75,000.00. *See James Neff Kramper Family Farm P'ship v. IBP, Inc.*, 393 F.3d 828, 834 (8th Cir.2005).

ABB and the Local filed cross-motions for summary judgment. Importantly, the Local did not argue that employees are entitled to receive wages without using paid-leave benefits while missing work to attend follow-up medical care. Rather, the Local's argument was that the MWCL mandates that those employees should be able to choose whether to use paid-leave benefits or excused leave without pay for the follow-up medical visits. The use of excused leave without pay would allow them flexibility to save their paid-leave benefits for future use. ABB argued rather pointedly, "If an employer can legally deny salary to an employee [attending follow-up medical care], it is absurd to claim an employee is illegally denied compensation by paying that employee for [that time]."

The district court denied ABB's motion for summary judgment and granted in part and denied in part the Local's motion for summary judgment. [FN3] The district court then issued judgment in favor of the Local, declaring on two alternative grounds that the MWCL prohibits ABB's practice of requiring an employee to use paid-leave benefits, rather than unpaid leave, when an employee must leave work to obtain follow-up care for a job-related injury. [FN4] First, the district court held that ABB's policy violates Mo.Rev.Stat. § 287.140.1 because it denies an injured employee his regular compensation. Alternatively, the district court held that ABB's policy placed an impermissible qualification on an

injured employee's exercise of the statutory right to medical care under the MWCL. ABB appeals from the district court's grant of partial summary judgment.

II. DISCUSSION

We review de novo a district court's grant of summary judgment, applying the same standard as the district court. *Donovan v. Harrah's Maryland Heights Corp.*, 289 F.3d 527, 528-29 (8th Cir.2002). Both parties agree that the facts are not in dispute. Therefore, we review de novo the district court's legal conclusions concerning the proper interpretation of the MWCL. *Gosnell v. Mullenix*, 11 F.3d 780, 781 (8th Cir.1993) ("We review de novo the district court's determinations of state law.").

One of the primary purposes of the MWCL "is to ameliorate, in the interest of working people and the public welfare, losses sustained from accidental injuries received by the working person in the course of employment." *City of St. Louis v. Grimes*, 630 S.W.2d 82, 85 (Mo. banc.1982) (quoting *Wengler v. Druggists Mut. Ins. Co.*, 583 S.W.2d 162, 164 (Mo. banc 1979), *rev'd on other grounds*, 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980)). To this end, the MWCL provides monetary compensation to an employee for wages lost as a result of an injury suffered during work. Under the relevant statutes, "the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings[.]" Mo.Rev.Stat. § 287.170.1(1); *see generally* Mo.Rev.Stat. §§ 287.170, 287.180, 287.190. The MWCL also imposes on employers an unqualified and absolute duty to provide medical care for employees injured during work. *Wiley v. Shank & Flattery, Inc.*, 848 S.W.2d 2, 4 (Mo.Ct.App.1992). The operative section of the statute provides: "In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Mo.Rev.Stat. § 287.140.1.

***3** In granting partial summary judgment to the Local, the district court held that the phrase "in addition to all other compensation" in § 287.140.1 was ambiguous because "compensation" was not explicitly defined in the MWCL. Therefore, the district court resorted to the dictionary definition of compensation. Merriam-Webster Dictionary, the dictionary used by the district court, defines compensation as "a recompense or reward for some loss or service." *Local 2379, United Auto., Aerospace and Agric. Implement Workers of Am. v. ABB, Inc.*, No. 03-4109-CV, slip op. at 5 (W.D.Mo. July 29, 2004). Placed in the context of employment, the district court held that compensation includes, "at a minimum, salary and fringe benefits, such as sick leave and vacation." *Id.* at 6. Consequently, the district court reasoned that § 287.140.1 prohibits ABB from requiring employees injured on the job to spend their "compensation," in the form of paid-leave benefits, in order to receive the statutorily mandated follow-up medical care.

We disagree with the district court's reasoning that the term "compensation" as used in the MWCL is ambiguous. Rather, we believe that § 287.140.1 must be read in the context of the entire MWCL. *See Marie v. Standard Steel Works*, 319 S.W.2d 871, 876 (Mo. banc 1959) ("[I]n determining the intent and meaning of [a term] used in the [MWCL], the words must be considered in their context and sections of the statutes in pari materia, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words."). One of the primary purposes of the MWCL is to provide workers monetary *compensation* for wages lost as a result of a workplace injury. In addition to this compensation for lost wages, § 287.140.1 also imposes an unqualified and absolute duty on the employer to provide medical care for the injured worker-in other words, to cover the worker's medical bills apart from and in addition to the compensation for lost wages. Properly understood, therefore, the term "compensation" as used in § 287.140.1 refers to the monetary compensation provided to injured workers as required by the MWCL, not to the overall compensation an employee generally receives from his employer in the normal course of the employment relationship. *See generally* Mo.Rev.Stat. §§ 287.170, 287.180, 287.190.

In this case, the parties concede and the district court recognized that the Local is not seeking to force ABB to pay wages outside the paid-leave benefit system for the time spent by injured employees in attending follow-up medical care. The Local seeks only to give injured employees a choice of taking paid leave or taking excused unpaid leave if they wish to preserve their paid leave for later use. Regardless of whether the context is the MWCL or the standard dictionary, we do not think the term "compensation" includes the right for an employee to take unpaid leave, instead of available paid-leave benefits, at the employee's sole discretion. Consequently, we believe that the district court erred when it broadened the term "compensation" to include the flexibility to take excused unpaid leave in order to attend follow-up medical care. We agree with ABB that it would be ironic to hold that ABB is denying compensation to an injured employee when the actual effect of its policy is to require

the employee to accept compensated, rather than uncompensated, leave.

*4 As a separate basis for summary judgment, the district court held that the Supplemental Agreement impermissibly shifted to the injured employee the burden of ABB's statutory duty to provide medical services. The district court reasoned that requiring an injured employee to use paid-leave benefits in order to receive statutorily-mandated medical care would impermissibly alleviate the employer's absolute and unqualified duty to provide such care. According to the district court, this "is contrary to the fundamental purpose of the [MWCL], which 'is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment." ' *Local 2379,* slip op. at 7 (quoting *Wolfgeher v. Wagner Cartage Serv., Inc.,* 646 S.W.2d 781, 783 (Mo. banc 1983)). We disagree.

We do not believe that ABB's practice under the Supplemental Agreement shifts to the injured employee any part of the employer's burden under the MWCL to provide for medical services. Nothing in the MWCL requires an employer to pay an injured employee outside the confines of the employer's established paid-leave benefits system when the employee leaves work to attend follow-up medical care. Further, nothing in the MWCL prohibits an employer from requiring an injured employee to use paid-leave benefits, rather than unpaid leave, in that situation. We decline to write such a provision into the MWCL when the legislature has not chosen to do so. Instead, we believe the MWCL's silence regarding an area of labor-management relations should not, as a general rule, create ambiguity in the statute. Indeed, there may be a number of permissible reasons for the Missouri General Assembly's disinclination to regulate this area of labor-management relations statutorily. *See Clark v. Kansas City, St. Louis & Chicago R.R. Co.,* 219 Mo. 524, 118 S.W. 40, 45-46 (Mo.1909) ("It would be idle to speculate upon the ground for such legislative omission and silence. For aught that we know both omission and silence may have been grounded on an allowable legislative reason."). In this case, silence may well have been intended to advance Missouri public policy favoring negotiated collective bargaining agreements that fix the conditions of employment between labor and management. *McAmis v. Panhandle E. Pipe Line Co.,* 273 S.W.2d 789, 793 (Mo.Ct.App.1954) ("[A]s a general rule, public policy favors the negotiation of collective bargaining agreements, or contracts, fixing conditions of employment between labor and management."). Recognizing that the Missouri General Assembly had been silent on this issue, the parties to this litigation originally viewed this controversy as a matter of contract, and we see no reason here to disturb judicially what has been agreed upon contractually. *See Evans v. Mo. Util. Co.,* 671 S.W.2d 812, 815 (Mo.Ct.App.1984) (viewing as a matter of contract the issue of whether payments under a collective bargaining agreement should be credited toward compensation required under the MWCL).

*5 In summary, MWCL § 287.140.1 gives an employee the right to employer-provided medical care in addition to monetary compensation for wages lost as a result of the work-place injury. The MWCL does not prohibit an employer from requiring an employee to use paid-leave benefits, rather than unpaid leave, when the employee leaves work to attend follow-up medical treatment. We conclude that the district court incorrectly interpreted the MWCL. We therefore see no reason why the parties' agreement in the Supplemental Agreement should not be enforced in its entirety.

III. CONCLUSION

The district court incorrectly held that the Missouri Workers' Compensation Law prohibits an employer from requiring an injured employee to use paid-leave benefits to attend follow-up medical treatment scheduled during work hours. Therefore, we reverse that part of the district court's judgment entered in favor of the Local and remand the case for entry of summary judgment in favor of ABB consistent with this opinion.

FN1. The Local explained the significance of "unexcused occurrences" as follows: "Under [ABB's] attendance policy, disciplinary action, graduating to discharge, is taken against hourly employees who receive four or more [unexcused] occurrences within a twelve month period."

FN2. It is apparently undisputed that no employee has ever been charged with an unexcused occurrence for failing to use paid-leave benefits when taking time away from work to receive follow-up medical care. ABB's practice has been to deduct automatically the time from the employee's paid leave. If an injured employee has exhausted his paid-

leave benefits, ABB's practice apparently is to grant an excused absence without pay. Our opinion

addresses both the policy embodied in the Supplemental Agreement and ABB's actual practice under that agreement.

FN3. The Local argued on summary judgment that the allegedly illegal exception provision should be severed from the Supplemental Agreement. The district court, concluding that the unexcused-occurrences provision was indelibly intertwined with the exception provision, denied the Local's motion for summary judgment insofar as it sought to sever the illegal provision from the Supplemental Agreement and enforce the remainder. Instead, the district court declared the entire Supplemental Agreement illegal and unenforceable.

FN4. The Missouri General Assembly recently amended the MWCL by adding subsection 14 to § 287.140. *See* S.B. 1, 93rd Gen. Assem., 1st Reg. Sess. (Mo.2005). The amendment provides, "The employer may allow or require an employee to use any of the employee's accumulated paid leave, personal leave, or medical or sick leave to attend to medical treatment, physical rehabilitation, or medical evaluations during work time. The intent of this subsection is to specifically supercede and abrogate any case law that contradicts the express language of this section." This amendment becomes effective August 28, 2005.

C.A.8 (Mo.),2005.
Local 2379, United Auto. Aerospace and Agricultural Implement Workers of America v. ABB, Inc.
2005 WL 1431512 (8th Cir.(Mo.))

Briefs and Other Related Documents (Back to top)

• 04-2914 (Docket) (Aug. 10, 2004)
END OF DOCUMENT

961 S.W.2d 50

Supreme Court of Missouri,
En Banc.
Gary P. AKERS, Deceased, et al., Respondents/Cross-Appellants,
v.
WARSON GARDEN APARTMENTS and Half Moon Village, Inc., et al., Appellants/Cross-Respondents.
No. 80240.
Jan. 27, 1998.

Dependents of employee killed by injuries sustained while working sought workers' compensation benefits. The Labor and Industrial Relations Commission granted compensation and death benefits and 15% increase in benefits due to employer's violation of state statute. Employer and insurer appealed. The Supreme Court held that: (1) dependents were entitled to 15% increase in benefits under statute penalizing employer for failure to comply with state statute; (2) employer did not forfeit its subrogation rights to recover benefits paid to employee's dependents against funds that dependents had recovered in third party negligence action; and (3) dependents were not entitled to recover disfigurement benefits for permanent partial disability. Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] KeyCite Notes

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.4 Sufficiency of Evidence in Support
413k1939.4(4) k. Substantial Evidence. Most Cited Cases

When reviewing sufficiency of evidence in workers' compensation proceeding, Court is limited to determining whether Labor and Industrial Relations Commission's award is supported by competent and substantial evidence on whole record.

[2] KeyCite Notes

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12 Scope and Extent of Review in General
413k1935 k. Presumptions and Burden of Showing Error. Most Cited Cases

When reviewing sufficiency of evidence in workers' compensation proceeding, evidence and inferences are reviewed in light most favorable to award, and Labor and Industrial

Relations Commission's findings will be set aside only when they are clearly contrary to overwhelming weight of evidence.

[3] KeyCite Notes

413 Workers' Compensation
413X Payment of Compensation and Compliance with Award
413X(C) Enforcement of Payment or Compliance
413k1042 k. Unfair Practices; Bad Faith; Penalties. Most Cited Cases

For workers' compensation claimant to be entitled to fifteen percent increase in benefits under statute penalizing employer for failure to comply with any state statute, claimant must demonstrate existence of statute or order, its violation, and causal connection between violation and compensated injury. V.A.M.S. § 287.120, subd. 4.

[4] KeyCite Notes

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(D) Increase or Reduction of Compensation
413IX(D)1 Misconduct in General (Prior to Injury)
413k938 Employer's Misconduct
413k941 k. Failure to Comply with Safety Statutes or Orders. Most Cited Cases

Townhouse in which workers' compensation claimant was working when he was injured was part of employer's place of business, and, thus, was "establishment" within meaning of safety statute prohibiting use of explosives or inflammable compounds in any establishment where labor is employed, where employer was in business of and derived income from leasing apartments and townhouses. V.A.M.S. § 292.080.

[5] KeyCite Notes

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(D) Increase or Reduction of Compensation
413IX(D)1 Misconduct in General (Prior to Injury)
413k938 Employer's Misconduct
413k941 k. Failure to Comply with Safety Statutes or Orders. Most Cited Cases

Workplace safety statutes, which were referred to as "so-called Factory Act" were not limited in their application to factories; language of several provisions shows that they applied to all manufacturing, mechanical and other establishments in state. V.A.M.S. §§ 292.020, 292.050, 292.080.

[6] KeyCite Notes

413 Workers' Compensation
413IX Amount and Period of Compensation

413IX(D) Increase or Reduction of Compensation
413IX(D)1 Misconduct in General (Prior to Injury)
413k938 Employer's Misconduct
413k941 k. Failure to Comply with Safety Statutes or Orders. Most Cited Cases

Evidence was sufficient to demonstrate that workers' compensation claimant's egress out of his work area was made more difficult by presence of lacquer thinner between him and steps, for purposes of imposing 15% increase in benefits against employer for violation of safety statute prohibiting use of inflammable compounds in any establishment where labor is employed, in such place or manner as to obstruct or render hazardous egress of operatives in case of fire, where witness testified that when fires started, claimant was standing in lacquer thinner, that it was between employee and steps, that he was able to escape because thinner was not between him and steps, and expert opined that claimant had no chance to escape fire because he was in envelope of vapors from lacquer. V.A.M.S. § 292.080.

[7] KeyCite Notes 

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(D) Increase or Reduction of Compensation
413IX(D)1 Misconduct in General (Prior to Injury)
413k938 Employer's Misconduct
413k941 k. Failure to Comply with Safety Statutes or Orders. Most Cited Cases

Evidence was sufficient to demonstrate causal connection between employer's violation of safety statute prohibiting use of inflammable compounds in any establishment where labor is employed in such place or manner as to obstruct or render hazardous egress of operatives in case of fire, for purposes of imposing 15% increase in workers' compensation benefits against employer for violation of state statute, where witness testified that when fires started, claimant was standing in lacquer thinner, that it was between employee and steps, that he was able to escape because thinner was not between him and steps, and expert opined that claimant would not have suffered such severe injuries if he had not been in envelope of vapors from flammable lacquer. V.A.M.S. § 292.080.

[8] KeyCite Notes 

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(D) Increase or Reduction of Compensation
413IX(D)1 Misconduct in General (Prior to Injury)
413k938 Employer's Misconduct
413k941 k. Failure to Comply with Safety Statutes or Orders. Most Cited Cases

Statute granting 15% increase of workers' compensation benefits to claimant for employer's failure to comply with any state statute does not allow 15% increase for each statutory violation. V.A.M.S. § 287.120, subd. 4.

[9] KeyCite Notes 

⇦413 Workers' Compensation
⇦413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
⇦413XX(C) Action Against Third Persons in General for Employee's Injury or Death
⇦413XX(C)3 Right of Employer or Insurer to Remedy of Employee or Employee's Representative
⇦413k2189 k. Subrogation or Assignment in General. Most Cited Cases

Employer did not forfeit its subrogation rights to recover workers' compensation and death benefits paid to employee's dependents against funds that dependents had recovered in third party negligence action arising out of work-related accident, despite employer's violation of safety statutes. V.A.M.S. §§ 287.150, 292.080..

[10] KeyCite Notes 

⇦413 Workers' Compensation
⇦413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
⇦413XX(C) Action Against Third Persons in General for Employee's Injury or Death
⇦413XX(C)3 Right of Employer or Insurer to Remedy of Employee or Employee's Representative
⇦413k2189 k. Subrogation or Assignment in General. Most Cited Cases

Employer's negligence is not factor to be considered in determining employer's subrogation rights in action against third party under workers' compensation subrogation statute. V.A.M.S. § 287.150.

[11] KeyCite Notes 

⇦413 Workers' Compensation
⇦413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
⇦413XX(C) Action Against Third Persons in General for Employee's Injury or Death
⇦413XX(C)3 Right of Employer or Insurer to Remedy of Employee or Employee's Representative
⇦413k2189 k. Subrogation or Assignment in General. Most Cited Cases

Purpose of workers' compensation subrogation statute is to protect and benefit employer liable for compensation, and statute is designed to afford indemnity for compensation payable by employer. V.A.M.S. § 287.150.

[12] KeyCite Notes 

⇦413 Workers' Compensation
⇦413XX Effect of Act on Other Statutory or Common-Law Rights of Action and

Defenses
413XX(C) Action Against Third Persons in General for Employee's Injury or Death
413XX(C)3 Right of Employer or Insurer to Remedy of Employee or Employee's Representative
413k2189 k. Subrogation or Assignment in General. Most Cited Cases

Adoption of comparative fault does not amend workers' compensation subrogation statute governing rights of employer to recoup compensation payments from third-party tort-feasor.

[13] KeyCite Notes

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(A) Basis for Determination of Amount
413k806 Disfigurement
413k807 k. In General. Most Cited Cases

Dependents of employee who died of injuries sustained while working failed to show that employee's injuries were partial in degree, and, thus, were not entitled to recover disfigurement benefits for permanent partial disability. V.A.M.S. §§ 287.190, subd. 6, 287.230.

***51** Kim M. Parks, Evan and Dixon, St. Louis, for Appellants/Cross-Respondents.
Mariano V. Favazza, St. Louis, Francis X. Duda, Anderson & Gilbert, St. Louis, for Respondents/Cross-Appellants.

***52** Ronald C. Gladney, Bartley, Goffstein, Bollato & Lange, L.L.C., Clayton, for amicus curiae.

PER CURIAM. [FN1]

> FN1. The appeal in this case was originally decided by the Court of Appeals, Eastern District, in an opinion written by the Honorable William H. Crandall, Jr. Following transfer to this Court, the court of appeals opinion, as modified, is adopted as the opinion of this Court.

Warson Garden Apartments and Half Moon Village, Inc., (Employer) and its insurer, Lumbermens Mutual Insurance Company, appeal and the dependents of Gary P. Akers (Employee) cross-appeal from an award of the Labor and Industrial Relations Commission (Commission). Affirmed in part; reversed in part; remanded.

Employer rents apartments and townhouses in St. Louis County. Employee worked as a maintenance person for Employer. On October 23, 1992, Employee and Frank Caliendo, who also worked as a maintenance person for Employer, were working in one of Employer's townhouses. They were using E-Z Lacquer Thinner to help remove tile glue from the basement floor. Employee was standing in a pool of the lacquer thinner when Caliendo saw a blue flame suspended in the air in the doorway of the basement's utility room. Caliendo yelled to Employee, "It's a fire" and "run." Caliendo then started to run to the stairs and would later state, "I must have got one, maybe two steps on the stairs and it blew me halfway up the stairs." When Caliendo realized Employee was not behind him, he unsuccessfully attempted to retrieve a garden hose to put out the fire. Caliendo then went back into the townhouse and helped Employee get out of the building.

According to one expert, a suspended vapor flash type fire occurred as a result of the lacquer thinner being poured in the basement and "vaporizing and migrating to the ignition source," a hot water heater. Employee was taken to the hospital and died the following day.
The three minor children of Employee (Claimants) filed a claim for workers' compensation benefits. After filing their claim, Claimants entered into a third-party settlement on their separate civil action. [FN2]

> FN2. The parties state that the settlement was for $750,000 but the judgment approving the settlement shows a settlement of $800,000. The
>
> exact amount of the settlement does not alter the disposition of any issue.

An administrative law judge (ALJ) conducted a hearing and: (1) found Employer's violation of two state statutes and five sections of the Occupational Safety and Health Act were the "efficient" cause of Employee's death; (2) found Claimants were entitled to only one fifteen percent increase of the compensation and death benefit under the provision of section 287.120.4 [FN3] ; (3) found Employer forfeited its right to subrogation of the increase in the compensation and death benefit awarded under section 287.120.4; (4) rejected Claimants' contention that Employer waived all of its subrogation rights because of the safety violations; and (5) awarded forty weeks of benefits under section 287.190.4 for disfigurement. The Commission modified portions of the ALJ's award and concluded that: (1) for purposes of the provision of section 287.120.4, requiring an increase in the compensation and death benefit, there was no causal connection between Employee's failure to be using a respirator, *see section 292.320,* and his death, but there was a causal connection between the violation of section 292.080 and Employee's death; (2) the ALJ properly determined that Claimants were entitled to only one fifteen percent increase of the compensation and death benefit under section 287.120.4; and (3) disfigurement benefits should not be awarded. The Commission also modified the ALJ's calculation of the increase required under section 287.120.4. Employer and its insurer appeal and Claimants cross-appeal.

> FN3. All statutory references are to RSMo 1986 unless otherwise indicated.

[1] [2] Review is only on questions of law. The Court will modify, reverse, remand or set aside an award only if the Commission acted without or in excess of its powers, the award was procured by fraud, the facts found by the Commission do not support the award, or there was not sufficient competent evidence in the record to warrant the making of ***53** the award. *Section 287.495; Thompson v. Delmar Gardens, Chesterfield,* 885 S.W.2d 780, 782 (Mo.App.1994). When reviewing the sufficiency of the evidence, the Court is limited to determining whether the Commission's award is supported by competent and substantial evidence on the whole record. *Searcy v. McDonnell Douglas Aircraft Co.,* 894 S.W.2d 173, 176 (Mo.App.1995). The evidence and inferences are reviewed in the light most favorable to the award, and the Commission's findings will be set aside only when they are clearly contrary to the overwhelming weight of the evidence. *Id.*

Fifteen Percent Increase of Benefit--Section 287.120.4

[3] Employer first argues that the Commission erred in increasing the compensation and death benefit under section 287.120.4. [FN4] This section provides:

> FN4. For purposes of this appeal, we shall refer to Employer when discussing the arguments presented by Employer and its insurer. Claimants' and Employer's arguments shall be considered jointly according to the issues.

Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.
To be entitled to the fifteen percent increase under section 287.120.4, a claimant must demonstrate the existence of the statute or order, its violation, and a causal connection between the violation and the compensated injury. *State ex rel. River Cement Co. v. Pepple*, 585 S.W.2d 122, 125 (Mo.App.1979). The Commission found that a fifteen percent increase under section 287.120.4 was proper because Employer violated section 292.080 and there was a causal connection between the violation of this statute and Employee's death. Section 292.080 provides: "No explosive or inflammable compound shall be used in any establishment in this state where labor is employed, in such place or manner as to obstruct or render hazardous the egress of operatives in case of fire."

[4] Employer asserts that section 292.080 is not applicable for the townhouse where Employee was working. The primary role of the courts when construing statutes is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent. *Abrams v. Ohio Pacific Exp.*, 819 S.W.2d 338, 340 (Mo. banc 1991). In determining legislative intent, statutory words and phrases are given their plain and ordinary meaning, and this meaning is generally derived from the dictionary. *Id.* Where no ambiguity exists, there is no need to resort to rules of statutory construction. *Id.* However, if an ambiguity exists, one "compelling" rule of construction requires the courts to presume that the legislature did not intend to enact an absurd law and favors a construction that avoids unjust or unreasonable results. *Id.* at 341.
Employer contends that the townhouse was not an "establishment" as that term is defined; therefore, it cannot be found to have violated section 292.080. An "establishment" is defined as a place of business. *Black's Law Dictionary* 490 (5th ed.1979). The evidence established that Employer's business was leasing apartments and townhouses. Employer was engaged in a commercial activity and derived revenue from leasing townhouses. The townhouse where the accident occurred was a place of business of Employer and, therefore, an establishment for purposes of section 292.080.
[5] Employer also contends that section 292.080 only applies to factories. In 1891, the legislature enacted several sections under chapter 292, including section 292.080. These sections have been referred to as the "so-called Factory Act." ***Martin v. Star Cooler Corporation*, 484 S.W.2d 32, 35 (Mo.App.1972)**; *Johnson v. Bear*, 225 Mo.App. 1097, 40 S.W.2d 481, 484 (1931). However, several sections provide language that shows the statutes are not applicable only to factories. Section 292.020 requires machinery to be properly guarded or notice posted "in all manufacturing, mechanical and other establishments in this state...." Section 292.050 refers to "every manufacturing, mechanical or mercantile or public buildings in this ***54** state...." Several other sections enacted in 1891 are not limited to factories. *See, e.g., sections 292.060; 292.110; 292.130; 292.140.* Review of the relevant sections enacted in 1891 demonstrates the legislature did not intend to limit the "so-called Factory Act" to

factories, and Employer's contention fails.
Employer's reliance on *Johnson,* where the court held that a farm was not an "other establishment" for purposes of section 292.020, is misplaced. In that case, the court recognized the unique nature of farming and that the worker's compensation act, RSMo 1929, excluded employment of farm labor. *Johnson,* 40 S.W.2d at 484-485. This analysis is not applicable to a townhouse.
[6] Employer next argues that section 292.080 was not violated because there is not sufficient evidence to show Employee's egress was made more difficult by the presence of lacquer thinner between him and the steps. Frank Caliendo testified that, when the fire started, Employee was standing in the lacquer thinner, and it was between Employee and the steps. He also testified there was not any lacquer thinner between him and the steps, and he was able to get to the first or second step of the stairs. An expert testified that based on his belief as to where the lacquer thinner was poured, Employee was in the "envelope" of the vapors, which had surrounded him. The expert also stated once the vapors from the lacquer thinner that surrounded Employee ignited, he had no chance to escape from the basement without substantial injury. There is sufficient and competent evidence to support the Commission's finding that the lacquer thinner was used in such a manner as to render hazardous the egress of Employee when the fire occurred.
[7] Employer next argues that the evidence fails to support a finding of a causal connection between a violation of section 292.080 and Employee's death. Employer asserts that regardless of any other injuries he suffered, Employee's death was caused by the initial "explosion." Employer states, "As long as [Employee] was in the basement when the fire occurred, he would have suffered the injuries severe enough to cause his death." Employer cites to the testimony of the expert who stated that Employee had no chance to escape without substantial injury once the vapors ignited.
Employee's autopsy report states that the cause of his death was massive pulmonary edema, which was a complication of his "extensive burns." The expert testified that the fire lasted about five seconds. This expert also stated if Employee had not been in the "envelope" of the vapors, he would not have suffered as significant an amount of injuries. This expert stated further that Employee and Caliendo were in the same line of egress. No thinner was located between Caliendo and the stairs, and he was able to reach the first or second step. The evidence is sufficient to find a causal connection between Employer's violation of section 292.080 and Employee's death. The Commission's finding that under section 287.120.4 the compensation and death benefit should be increased fifteen percent for Employer's violation of section 292.080 is supported by substantial and competent evidence.
[8] Claimants argue that under section 287.120.4 the compensation and death benefit should be increased fifteen percent for each statute violated by Employer. Claimants contend that because Employer violated eight safety laws, then under section 287.120.4 the compensation and death benefit should be increased 120 percent. We disagree.
As discussed, section 287.120.4 provides that benefits are increased fifteen percent for an employer's failure to comply with any statute or lawful order. But this section does not contain specific language providing for a fifteen percent increase for *each* statutory violation. According to Claimants, they are entitled to an increase of approximately $156,000. This demonstrates that increasing benefits by fifteen percent for each violation can result in a substantial increase in the compensation and death benefit. Absent specific statutory language, we do not find that the legislature would intend this result. In addition, section 287.120.5 provides for a fifteen percent reduction of benefits when an employee willfully fails to use safety devices or fails to obey an employer's safety rules. ***55** If Claimants' argument were accepted, then, by analogy, employees or their dependents could have their benefits reduced fifteen percent for each violation. This could result in a total forfeiture of benefits. Again, we do not find that the legislature would intend such a result. The Commission did not err by concluding that

the fifteen percent increase under section 287.120.4 could not be applied cumulatively for each violation. [FN5]

> FN5. Because only one fifteen percent increase may be assessed, we need not address Claimants' arguments that there was sufficient evidence of causation under section 292.320 to award an increased compensation and death benefit and that violations of the Occupational Safety and Health Act give rise to increased awards under section 287.120.4.

Subrogation--Section 287.150

[9] Claimants argue that Employer is not entitled to subrogation of the compensation benefits awarded. We disagree.

Claimants first contend that the Commission concluded that Employer has no rights of subrogation for compensation benefits. In his decision, the ALJ calculated the compensation and death benefit, in part, by using the birth date of the youngest claimant and assuming death benefits would be payable until he reached the age of twenty-one. The Commission found that the ALJ's prospective calculation of the compensation and death benefit based on the benefits that may have been payable for the youngest claimant was improper. The Commission stated that if the youngest claimant was a full-time student he could be entitled to benefits until age twenty-two, Claimants could all die before age eighteen, and Claimants could become active duty members of the armed forces or become physically or mentally incapacitated from wage earning. *See section 287.240.(4)(b).* The Commission found these possibilities made it impossible to determine the amount of benefits that would be paid. The Commission concluded that along with the increase in compensation owed from the date of Employee's death until the ALJ's award, the increase in compensation and death benefit under section 287.120.4 should be applied as the compensation became due. The Commission's decision refers to weekly compensation payments of $172.71 and a fifteen percent increase beginning February 21, 1996, the date of the ALJ's award. [FN6]

> FN6. The Commission issued an amended decision recalculating the amount of benefits owed from the time of Employee's death until the ALJ's award because of a mathematical error.

Claimants suggest the Commission ordered Employer to continue to pay weekly death benefits and a fifteen percent increase; therefore, the Commission concluded that Employer has no subrogation rights for compensation benefits. In his decision, the ALJ specifically rejected Claimants' argument that due to its safety violations Employer waived all subrogation rights. The Commission modified the ALJ's award to the extent indicated in its decision. The Commission did not address Claimant's waiver argument and, therefore, adopted the ALJ's decision. The Commission recalculated the amount of the increase in the compensation and death benefit because of certain errors by the ALJ. [FN7] This recalculation does not reflect that the Commission was modifying the ALJ's decision regarding Claimants' argument of waiver.

> FN7. We reject Claimants' contention that the ALJ rather than the Commission properly calculated the amount of the increase in the

compensation and death benefit.

Claimants next contend that it is inequitable for Employer to be entitled to subrogate the compensation awarded because it violated Missouri safety statutes. Section 287.150 governs subrogation rights of employers. This section has no provision that an Employer forfeits it subrogation rights because of its fault or specific violations of state safety statutes.

[10] Missouri case law does not support Claimants' contention. An employer's negligence is not a factor in an action against a third party brought by an employer under the subrogation statute. *General Box Co. v. Missouri Utilities Co.*, 331 Mo. 845, 55 S.W.2d 442, 449 (1932). In *General Box*, the dependents of an employee who died from injuries arising out of and in the course of employment were awarded compensation benefits. *Id.* at 443. Under Missouri's then ***56** subrogation statute, section 3309, RSMo 1929, the employer brought a wrongful death action against a third party, electric company, alleging the company's negligence caused the employee's death. The company pleaded as an affirmative defense that the employer's negligence was the cause of the employee's death. *Id.* at 444. The Court held that the subrogation statute made no exception for the subrogation rights of the employer to recover against a negligent third party based on any negligence of the suing employer concurring with or contributing to the third party's negligence. *Id.* at 445. The Court stated that the "sole test" of a third party's liability to the subrogated employer is the liability of the third party to the injured employee or dependents, and it was no defense for the third party to show that the employer was concurrently and contributorily negligent. *Id.*
In a later case involving an employee's action against a third party, the Court considered the third party's argument that it was improper to permit the employee to recover for the concurrent negligence of the third party and the employer, because it would permit the employer to profit by its own negligence. *Liddle v. Collins Construction Company*, 283 S.W.2d 474, 478 (Mo.1955). Relying on *General Box*, the Court rejected this argument. *Id.* Furthermore, it has been held that without a specific indemnity agreement, "an employer is not liable to the non-employer defendant for any sums that the latter might be responsible for in tort to the injured plaintiff-employee." *Martin v. Fulton Iron Works Co.*, 640 S.W.2d 491, 496 (Mo.App.1982).
These cases notwithstanding, Claimants argue other jurisdictions have decided that an employer's negligence is a factor to be considered in determining the employer's subrogation rights. *Roe v. Workmen's Compensation Appeals Board*, 12 Cal.3d 884, 117 Cal.Rptr. 683, 528 P.2d 771, 774-776 (Ca.1974); *Liberty Mutual Insurance Company v. Adams*, 91 Idaho 151, 417 P.2d 417, 421-423 (Id.1966). The decisions in these states are in the minority. *2B Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation, sections 75.22, 75.23* (1996).

[11] For the following reasons, we decline to adopt the minority rule. Missouri's workers' compensation statutes provide a no-fault system of compensation for workers. An employer subject to the statutes is liable to furnish compensation "irrespective of negligence" for an employee's personal injury or death arising out of and in the course of employment. *Section 287.120.1.* Accordingly, there may be instances where compensation is owed despite a lack of negligence by an employer. The purpose of the subrogation statute is to protect and benefit the employer liable for compensation, and the statute is designed to afford indemnity for compensation payable by the employer. *McCormack v. Stewart Enterprises, Inc.*, 916 S.W.2d 219, 224 (Mo.App.1995). The statute prevents an employee from receiving a double recovery, which has been referred to as an " 'evil to be avoided.' " *Id.* (citation omitted). In addition, an employer does not escape liability for violating state statutes. Section 287.120.4 provides for an

increase in the compensation and death benefit when an employee's injury is caused by the failure of an employer to comply with a state statute. Finally, section 287.150 does not distinguish between an employer whose fault contributed to an employee's death or injury and an employer that was free of fault. If we were to adopt the minority rule, this would create a substantial exception to the subrogation statute, namely that an employer is only entitled to subrogation when it is free of fault. This is more properly a function of the legislature.

[12] Claimants also contend that Missouri's adoption of comparative fault bars Employer's subrogation rights. The adoption of comparative fault "does not amend the statute governing the rights of the employer to recoup compensation payments from a third-party tort-feasor." *Rogers v. Home Indemnity Co.*, 851 S.W.2d 672, 676 (Mo.App.1993). In *Rogers*, the employee settled his negligence suit against a third party for $65,000, based on a total sum of $130,000, which was reduced fifty percent because of the employee's stipulated percentage of fault. *Id.* at 673. The trial court calculated the employer's insurer's subrogation interest as ***57** $23,752.97 using the formula set out in *Ruediger v. Kallmeyer Brothers Service*, 501 S.W.2d 56, 59 (Mo. banc 1973). *Id.* at 674. The employee argued that in light of the adoption of comparative fault the insurer's interest of $23,752.97 should be reduced fifty percent, the amount of proportionate fault assessed to the employee. *Id.* In rejecting this argument, the Court held that under the subrogation statute an employer is entitled to reimbursement for amounts paid to an employee for workers' compensation benefits from any recovery against a third-party tortfeasor and that comparative fault played no part in the amount due the employer. *Id.* at 676. The Court did note that the employer was not at fault. *Id.* at 673. However, this does not alter the analysis. As held in *Rogers*, the adoption of comparative fault does not amend the subrogation statute. [FN8] In addition, Missouri's adoption of comparative fault has not altered the rule regarding a third party's action against an employer for contribution. *Sweet v. Herman Bros., Inc.*, 688 S.W.2d 31, 32- 33 (Mo.App.1985); *See Redford v. R.A.F. Corp.*, 615 F.Supp. 547, 548-549 (W.D.Mo.1985). Employer is entitled to subrogation of compensation benefits including medical expenses as determined by the Commission. *McCormack*, 916 S.W.2d at 226.

> FN8. In 1993, the legislature amended sections 287.150.1, 287.150.2 and 287.150.3 to take into consideration an employee's comparative fault for the employer's recovery and credit for future installments. These amendments do not reflect that the adoption of comparative fault now constitutes a bar to an employer's subrogation rights. *See generally Liberty Mut. Ins. Co. v. Garffie*, 939 S.W.2d 484, 485-486 (Mo.App.1997)(discussing amendment of section 287.150.3).

The Employer's right to subrogate as to the amount of the increase in the compensation and death benefit under section 287.120.4 is no different from the right to subrogate as to the amount of the other compensation awarded. As noted earlier, section 287.120.4 states that the "compensation and death benefit shall be increased." The statute makes no attempt to differentiate the part of the award calculated under other provisions of chapter 287 and the part of the award calculated under section 287.120.4. Subrogation is governed by section 287.150. That section specifically provides: [T]he employer shall be subrogated to the right of the employee or to the dependents and the recovery shall not be limited to the amount payable as compensation to such employee or dependents, but *such employer may recover any amount which such employee or [the] dependents would have been entitled to recover.* Any recovery by the employer against such third person, in excess of the compensation paid by the

employer shall be paid forthwith.
(Emphasis added.)
This section likewise makes no distinction between the part of the compensation and death benefit computed under section 287.120.4 and the part of the compensation and death benefit computed under other provisions of chapter 287.
In light of the clear language of the statutes, the Commission was in error in determining that Employer forfeited its right to subrogation of the increased compensation and death benefit under section 287.120.4. This part of the Commission decision is reversed.

Disfigurement Benefits--Section 287.190.4


[13] Claimants argue the Commission erred by not awarding disfigurement benefits. Section 287.190.4 provides:
If an employee is seriously and permanently disfigured about the head, neck, hands or arms, the division or commission may allow such additional sum for the compensation on account thereof as it may deem just, but the sum shall not exceed forty weeks of compensation.
Section 287.190 provides for the compensation to be paid for and defines "permanent partial disability." Section 287.190.6 defines "permanent partial disability" as being permanent in nature and partial in degree. Employee died the day after the fire but his death does not affect Employer's liability to furnish compensation as provided in chapter 287. *Section 287.230.* However, there is no ***58** evidence that Employee's injuries were partial in degree and, therefore, that he was entitled to compensation for permanent partial disability. Accordingly, the Commission did not err by failing to award disfigurement benefits.
The award of the Commission is affirmed in part and reversed in part, and the cause is remanded to the Commission for proceedings not inconsistent with this opinion.

All concur.
Mo.,1998.
Akers v. Warson Garden Apartments
961 S.W.2d 50
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DISCHARGE FOR A POSITIVE DRUG TEST ON OR AFTER 01-01-05

Missouri Employment Security Law, Section 288.045, calls for cancellation of part or all of the wage credits earned with an employer, if the worker was discharged on or after 01-01-05 because of testing positive for non-prescribed controlled or illegal drugs. [redacted] Division policy is to cancel all wage credits earned with the discharging employer. [redacted]

A discharge for refusal to submit to a drug or alcohol test or submitting an adulterated sample does not fall under 288.045. If the employer does not test a worker because of self-admission to drug or alcohol use, Section 288.045 does not apply. These examples could be misconduct under Employment Security law, Section 288.050. Also apply Section 288.050 when the employer is unable to provide all the documentation required under 288.045, and the claimant has clearly violated the employer's drug-free workplace policy.

To apply 288.045, these conditions must be met:

- The worker must have been notified of the employer's drug-free policy. The policy must state that a positive test may result in termination. A test may be given if sufficient cause exists or on a random basis. If a test is random, the policy must clearly state that there will be random testing.
- If an employer initiates a new drug testing policy after 01-01-05, the employer must allow 60 days from a one-time notice to all employees before testing is done.
- The test must not be a pre-employment drug screen.
- The worker must have been at work with a detectable amount of alcohol or controlled substance in his/her system.
- The test must have been conducted at a lab certified by the Department of Health and Human Services (HHS).
- If the worker is a part of a collective bargaining agreement (CBA) that calls for testing at a facility other than an HHS certified lab, the lab must follow Department of Transportation (D.O.T) chain of custody guidelines.
- For carboxy-tetrahydrocannabinol, which is marijuana, the test result must be at least 50 nannograms per milliliter.
- The worker has the right to request that the sample be retested at a different lab , if he/she questions the lab results. If the employer refuses to allow the second test, no misconduct can be found under 288.045. Misconduct could still be found under 288.050. The worker is required to pay for the confirmation test only if the result is positive again. However, if the worker does not have the second test done because of not having the money to pay for it, it will be ruled as no second test was requested. The worker would have to seek reimbursement from the employer if the second test was negative.
- The employer must provide documentation for the record. (See page 3)

An example of how to write an [redacted] determination is: "The claimant was discharged because he tested positive for drugs. The test was given in accordance with the employer's drug free policy, using D.O.T. guidelines as specified in Missouri Employment Security Law, Section 288.045. Wage credits earned from 10-01-03 thru 02-03-05 are cancelled."

QUESTIONS FOR CLAIMANT ON POSITIVE DRUG TEST

- Why were you tested for drugs?
- What were your job duties?
- Does the employer have a drug policy?
- What is the policy?
- Were you informed of the drug testing policy prior to testing? If so, when and how?
- Does the policy state a positive test result is considered misconduct and may result in suspension or termination of employment?
- Are you a member of a union with a CBA governing drug testing?
- Was a urine test administered? If not, what kind of test was administered?
- Where was the drug test given?
- Were you sent from work to take the drug test?
- What was the date of the drug test?
- What was the date of your discharge?
- Describe the process of obtaining the sample.
- For what drug(s) did you test positive?
- Did you use the drug(s) for which you tested positive?
- Did you use any illegal drugs or drugs that were not prescribed for you?
- If not, do you know why you tested positive?
- Did a medical review officer call you to discuss the results of the test?
- Did you ask the employer to retest the sample? If so, what was the result?

QUESTIONS FOR EMPLOYER ON POSITIVE DRUG TEST

- Why was the claimant tested? Find out specifically why the claimant was suspected of being under the influence. Try to obtain specific details.
- What were the claimant's job duties?
- What is your drug policy?
- When and how was the claimant informed of the drug testing policy?
- When was it put into effect?
- Does the policy state a positive test result is considered misconduct and may result in suspension or termination of employment?
- Is the employee a member of a union with a CBA governing drug testing?
- What was the date of the drug test?
- What was the date of the discharge?
- Was the claimant sent from work to be tested? If not when was the employee tested?
- Where was the tested given?
- Where was the sample tested?
- Was the test conducted per DOT procedures or in accordance with the CBA?

- What was the drug(s) for which the claimant tested positive?
- What was the level(s) of the test results?
- Did the claimant admit or deny drug use?
- Did the claimant ask that the sample be retested? If so, did you deny the request?

DOCUMENTS THE EMPLOYER MUST SUBMIT

- A copy of the employer's drug testing policy or CBA, if applicable. It would be best to have a document with the claimant's signature acknowledging receiving/understanding the policy, particularly if the claimant denies having been informed of the policy.
- A copy of the chain of custody form from the place where the claimant was sent to submit the urine sample. Section 288.045 can still apply without a chain of custody form, if the employer cannot provide one, especially when all parties agree to the test results. It could be a problem if the claimant disagrees with the results and challenges the chain of custody.
- A copy of the lab test result showing the level(s) of the test results. This is not the Medical Review Officer (MRO) report. In some cases it may be necessary to call the MRO to get the lab report.
- A copy of the MRO report, if the claimant states the MRO was provided information regarding prescribed medication that could have caused the positive result.
- If a certified lab was not used because of a collective bargaining agreement, a copy of the section of the collective bargaining agreement specific to drug testing is needed.

DOCUMENTS REQUIRED IN THE RECORD

- A list of HHS certified labs for the month and year the claimant was tested.
- A list of the accepted drug cut-off amounts needed for a positive test.

EXAMPLE OF TESTING PROCEDURE

Below is an example of how a drug test may be administered:

The worker is sent from work to a facility that handles drug testing and asked to provide a urine sample. The worker gives the vile containing the urine sample to a certified technician. The technician checks to ensure that the sample is the correct color and temperature. A test strip is used to collect a small sample to test. The urine is split into two containers and sealed. The technician numbers the containers and has the claimant sign the chain of custody form to acknowledge the paper work and the information on the containers match. During this entire process the urine sample should not have left the worker's or technician's sight. If the test strip indicates a possible positive result, one of the urine samples is sent to a certified lab to be tested.

If the test done by the certified lab is positive for a drug or drugs, the result is sent to a MRO. Normally, the MRO is independent from the lab. The MRO attempts to contact the worker for questioning regarding medication taken. If this information could affect the test result, the information is given to the lab. The lab does another test to determine how the medication would affect the reading. The result is a reading that indicates the level of the medication (L) and the level

of illegal drugs (D). For example, a Vicks inhaler could affect the reading for methamphetamines. The follow-up test could show a 6% reading for the Vicks inhaler and 94% reading for illegal methamphetamines.

If the worker disagrees with the test results, the worker may ask the employer to have the sample retested. This does not mean the worker has the right to provide a new urine sample, because by then the drugs may be out of his/her system. If a confirmation test is done, the second split sample is sent to a different certified lab that has no connection with the lab performing the first test.

There are various methods used in administering a drug test, some more sophisticated or technical than others. The above is just one example.

DISCHARGE FOR A POSITIVE ALCOHOL TEST ON OR AFTER 01-01-05

Missouri Employment Security Law, Section 288.045, calls for cancellation of part or all the wage credits earned with an employer, if the claimant was discharged on or after 01-01-05 because of testing positive at a level of .08 percent or above for alcohol while at work. [redacted] Division policy is to cancel all wage credits earned with the discharging employer. [redacted]

If a person was at work, apparently intoxicated, but was not tested, section 288.045 does not apply, even if the claimant admitted to drinking on the job or before work. If the person was tested but the result was below .08 percent alcohol, Section 288.045 does not apply. Misconduct could be found in both of these circumstances under Employment Security law, Section 288.050.

Regular Employment Security law for misconduct under Section 288.050, rather than 288.045, can be used if there are sufficient facts to establish misconduct but the employer is unable to supply required documentation, such as the breathalyzer technician's certificate.

When testing for alcohol, the DOT standard allows only saliva or breath for screening tests and only breath for confirmation tests using approved devices. DOT does not accept blood or urine. If urine or blood is used for testing, it is possible to get to misconduct but the ruling would have to be under Section 288.050.

An example of how to write an [redacted] determination is: "The claimant was discharged because he tested positive for alcohol. The test was conducted in accordance with the employer's alcohol free workplace policy and Employment Security Law, Section 288.045. Wage credits are cancelled from 01-01-03 through 01-25-05."

QUESTIONS TO ASK CLAIMANT

- Why were you tested for alcohol?
- What were your job duties?
- Does the employer have an alcohol policy?
- What is the policy?
- Were you informed of the alcohol testing policy prior to testing? If so, when and how?
- Does the policy state a positive test result is considered misconduct and may result in suspension or termination of employment?
- Are you a member of a union with a CBA governing alcohol testing?
- Were you given a breathalyzer test? If not, how were you tested?
- Where was the alcohol test given?
- Were you sent from work to take the breathalyzer test?
- What was the date of the alcohol test?
- What was the date of your discharge?

- Describe the process of obtaining the sample?
- What was the result of the test (alcohol percent)?
- Did you consume alcohol prior to work or at work on the day of the incident?
- If not, do you know why you tested positive?

Obtain specific details. If the claimant admits to having a few beers several hours before work, find out the time he or she stopped drinking and how many beers were consumed. If the claimant says the test was positive because of taking Nyquil, find out how much Nyquil was consumed and the normal dosage.

QUESTIONS TO ASK THE EMPLOYER

- Why was the claimant tested? Find out specifically why the claimant was suspected of being under the influence. Try to obtain specific details.
- What were the claimant's job duties?
- What is your alcohol policy?
- When and how was the claimant informed of the alcohol testing policy?
- When was it put into effect?
- Does the policy state a positive test result is considered misconduct and may result in suspension or termination of employment?
- Is the employee a member of a union with a CBA governing alcohol testing?
- What was the date of the alcohol test?
- What was the date of the discharge?
- Was the claimant sent from work to be tested? If not, when was the employee tested?
- Where was the test given?
- Was the test conducted per DOT procedures or in accordance with the CBA?
- What is the name of the technician who administered the breathalyzer test? Is the technician certified?
- What was the level(s) of the test results?
- If the claimant tested positive at a level below .08 percent alcohol, does your policy state that any detectable level of alcohol is prohibited?
- Did the claimant admit or deny alcohol use?

DOCUMENTS REQUIRED FROM THE EMPLOYER

- A copy of the employer's alcohol testing policy or CBA, if applicable. It would be best to have a document with the claimant's signature acknowledging receiving/understanding the policy, particularly if the claimant denies having been informed of the policy.
- Copy of the test result.
- Copy of the breathalyzer technician's certificate. If a breathalyzer test was not given but instead a urine sample was taken, the same documentation is required that is needed for a positive drug test.

Comments Regarding MoDOT's Proposed Change to 1 CSR 20-5.0202(D)1 (Change Date of Annual Leave Sweep from October 31 to December 31)

AGENCY	IN SUPPORT	OPPOSED	NEUTRAL	COMMENTS
MoDOT	X			
MDI	X			Would support the change.
MDA	X			Would provide "seasonal" and MSF employees more flexibility to use leave prior to the sweep.
MDC	X			Would support the change.
OA		X		Would cause problems with staff coverage toward the end of the year. Leave balance checking would be one more item to be concerned about at Calendar Year End activities.
DMH		X		November and December are greatest challenges in scheduling because of holidays, sick leave, and employees working overtime. More employees would lose leave due to unable to approve absenses.
DOR		X		Would create staffing burden during the holiday season.
DHSS		X		If date can not be June 30, then we don't want it changed.
DOC			X	Mixed reactions but majority agreed would be more advantageous to employees.
DESE			X	Could have negative impact on shared leave pool, but would not oppose the change.
MSHP-DPS			X	Could identify pros and cons. Will live with outcome, whichever way it comes out.
MSPD			X	Taking a neutral position.
DHE			X	Either date is fine with their agency.
OSCA			X	Judiciary does not allow employees to gain more than the maximum at any time. We "sweep" every month.
DNR			X	Mixed reactions but would not oppose. Could live with whatever happens.